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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA, ON BEHALF)	
OF THE NATIONAL OCEANIC AND)	
ATMOSPHERIC ADMINISTRATION AND THE)	
UNITED STATES DEPARTMENT OF THE)	Case No. CV 21-44
INTERIOR; THE STATE OF WASHINGTON)	
THROUGH THE WASHINGTON)	
DEPARTMENT OF ECOLOGY;)	CONSENT DECREE
MUCKLESHOOT INDIAN TRIBE;)	
SUQUAMISH TRIBE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
VIGOR INDUSTRIAL LLC;)	
EXXON MOBIL CORPORATION.,)	
)	
Defendants.)	
)	

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I. INTRODUCTION

The United States of America (“United States”), on behalf of the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (“NOAA”), and the United States Department of the Interior; the State of Washington (the “State”) through the Washington State Department of Ecology; the Suquamish Tribe; and the Muckleshoot Indian Tribe (collectively, “Plaintiffs”), have filed a complaint in this case against Defendants Vigor Industrial LLC (“Vigor”) and Exxon Mobil Corporation. (“Exxon Mobil”), (collectively “Defendants”), pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9607; the Model Toxics Control Act (“MTCA”), chapter 70.105D RCW; Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702(b)(2)(A) for Covered Natural Resource Damages as a result of releases of hazardous substances and discharges of oil into the Lower Duwamish River (“LDR”) and/or Elliott Bay (as defined below). The Lower Duwamish River is an urban waterway in and near Seattle, Washington which flows into Elliott Bay that has been subject to considerable levels of industrial use throughout its history and into the present. This Consent Decree (the “Decree”) addresses the claims asserted in the Complaint against the Defendants.

II. BACKGROUND

A. The United States Department of Commerce, acting through NOAA; the United States Department of the Interior; the Washington Department of Ecology on behalf of the State of Washington; the Suquamish Tribe, and the Muckleshoot Indian Tribe (collectively, “the Trustees” and, individually, a “Trustee”), under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 1006(b) of OPA, 33 U.S.C. § 2706(b), 40 C.F.R. Part 300, subpart G,

1 and RCW 70.105D.040(2), serve as trustees for natural resources for the assessment and
2 recovery of damages for injury to, destruction of, or loss of natural resources under their
3 trusteeship.

4 B. Investigations conducted by the Trustees and others have detected hazardous
5 substances and oil in the surface water, sediments, soils and groundwater of the Lower
6 Duwamish River, including but not limited to, arsenic, antimony, cadmium, chromium, copper,
7 mercury, nickel, lead, zinc, bis(2 ethylhexyl) phthalate, hexachlorobenzene,
8 hexachlorobutadiene, tributyltin (“TBT”), polychlorinated biphenyls (“PCBs”), and polycyclic
9 aromatic hydrocarbons (“PAHs”). Overall, the Trustees have documented the presence of over
10 thirty (30) hazardous substances in the sediments of the LDR.
11

12 C. The Trustees began assessing damages to natural resources in the LDR in 1990
13 by finding that hazardous substances and oil had been released into the LDR; that natural
14 resources had likely been injured by the releases; that data sufficient to pursue a natural resource
15 damage assessment were available or could likely be obtained at a reasonable cost; and that,
16 without further action, future response activities would not adequately remedy the resource
17 injuries. *See, e.g.*, NOAA, Lower Duwamish Waterway Sediment Characterization Study
18 Report (Dec. 10, 1998), Elliott Bay Trustee Council, Pre-Assessment Screen for LDR
19 (December 2009), Final Lower Duwamish River NRDA Restoration Plan and Programmatic
20 Environmental Impact Statement (July 2013), and Final Lower Duwamish River NRDA: Injury
21 Assessment Plan (March 2019).
22

23 D. Although the Trustees have initiated, but not yet completed a natural resource
24 damage assessment for the LDR, the Trustees have developed and analyzed information
25 sufficient to support settlements that are fair, reasonable and in the public interest.
26

1 E. In settlement of this action, Defendants Vigor and Exxon Mobil agree, in lieu of
2 and as equivalent to monetary damages, to construct, develop, monitor and maintain the habitat
3 restoration projects as described in the Scope of Work attached hereto as Appendix A (“Vigor
4 Shipyards Habitat Projects” or the “Projects”) at Defendant Vigor’s property located on Harbor
5 Island adjacent to the West Waterway of the LDR (as described in Appendix B [*Tax Parcels*
6 *7666702850, 7666702851, 7666702852, and 7671800254*]). As required by this Decree,
7 Defendants will take measures to ensure that the Project Sites remain available for, and their use
8 dedicated to, the Projects. Defendants also agree to fund and be responsible for permanent
9 Stewardship of the Projects. Defendants further agree to reimburse the implementation costs
10 incurred, and to be incurred, by the Trustees for oversight of the Projects (Section X) and a
11 portion of the Trustees’ past natural resource damage assessments costs for the LDR (Section
12 XI).

15 F. Defendant Exxon Mobil, and its predecessors, owned a portion of the property
16 identified in Appendix B from about 1906 to August 30, 1967. Exxon Mobil’s ownership is
17 shown on the map attached as Appendix B. During this time period, Exxon Mobil operated a
18 petroleum storage facility at the property. Exxon Mobil sold the property to Todd Shipyards
19 Corp. on or around August 30, 1967.

21 G. Defendant Vigor acquired Todd Shipyards Corp. in 2011, and is the parent of
22 Todd Shipyards Corp. (n/k/a Puget Sound Commerce Center, Inc.), the current owner and
23 operator of the property identified in Appendix B. Since at least 1967, Todd Shipyards Corp.,
24 and its parent Vigor, have operated a shipyard for the construction and repair of various types of
25 vessels at the property.
26
27

1 H. Plaintiffs allege in the Complaint that Defendant Vigor is a current owner and/or
2 operator of, and both Defendants owned and/or operated at the time of the disposal of hazardous
3 substances, facilities on, adjacent to, or near the LDR within the meaning of 42 U.S.C. § 9607
4 and RCW 70.105D.040. Plaintiffs allege that hazardous substances have been released and oil
5 discharged to the LDR from the facilities owned and/or operated by Defendants, identified in
6 Appendix B, through direct discharge or other process discharges that have flowed to the LDR.
7 The alleged discharges were to “navigable waters” or “adjoining shorelines” within the meaning
8 of Section 1002(a) of OPA, 33 U.S.C. § 2702(a), and Section 311(b)(3) of the CWA, 33 U.S.C.
9 § 1321(b)(3). Plaintiffs also allege that investigations have detected hazardous substances in
10 soils, surface water, groundwater and/or sediments on or in the property or facilities, and some
11 of these hazardous substances are found in the surface water and sediments of the LDR.
12 Plaintiffs further allege that hazardous substances released and oil discharged to the LDR from
13 the facilities owned and/or operated by Defendants have caused injury to, destruction of and
14 loss of Natural Resources in the LDR under Plaintiffs’ trusteeship, including fish, shellfish,
15 invertebrates, birds, surface water and sediments, and resources of cultural significance.
16 Plaintiffs allege that each of them and the public have suffered the loss of natural resource
17 services (including ecological services as well as direct and passive human use losses) as a
18 consequence of those injuries.
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22 I. To facilitate resolving natural resource damage claims, relying upon the results of
23 remedial investigations, regulatory standards, and scientific literature, the Trustees developed an
24 estimate of the amount of injury to Natural Resources that had occurred as a result of releases of
25 hazardous substances and discharges of oil to the LDR. The Trustees quantified the effects of
26 the injuries in terms of the losses of ecological services over affected areas of the LDR and over
27

1 time, discounted to a present value. Plaintiffs used the term discounted ecological service acre-
2 years (“DSAYs”) to describe both the scale of the injuries, and the amount of habitat restoration
3 they are seeking to compensate for the injuries. At this time, for purposes of early settlements,
4 including this Consent Decree, the Trustees’ estimated total number of DSAYs for the LDR is
5 5,278.
6

7 J. Plaintiffs assert that hazardous substance releases and oil discharges to the LDR
8 have become dispersed and commingled to the extent that the effects of releases or discharges of
9 one Potentially Responsible Party (“PRP”) cannot be readily distinguished from another’s.
10 Plaintiffs further assert that the circumstances of the LDR contamination make all PRPs who
11 contributed to the contamination jointly and severally liable for all injuries to Natural Resources
12 that have resulted from the contamination. As a consequence, Plaintiffs assert the right to
13 recover for damages and associated damage assessment costs from any Lower Duwamish River
14 PRP. Without prejudice to their position and solely for purposes of facilitating early settlements
15 with individual PRPs, the Trustee Council developed a streamlined process for allocating natural
16 resource ecological damages liability among the PRPs. Plaintiffs have determined that settling
17 with Defendants for a portion of the natural resource damages attributable to all LDR sources
18 would result in a fair and equitable resolution of Plaintiffs’ claims. Taking into consideration
19 prior settlements with other PRPs who bore some liability for hazardous substance contamination
20 of the LDR and releases of hazardous substances and oil by non-settling parties, Plaintiffs have
21 agreed to settle their claims against Defendants as provided in this Consent Decree. Plaintiffs
22 have determined based upon the facts regarding Defendants’ ownership and operations, and
23 other equitable factors, that Defendants account for 340 of the total estimated DSAYs for the
24 LDR. By resolving Defendants’ liability in this Consent Decree, the restoration described in the
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1 attached Scope of Work provides substantial benefits to natural resources earlier than otherwise
2 would be realized, thereby allowing for earlier recovery of natural resources in the Lower
3 Duwamish River. Significantly, the location of the restoration is at the mouth of the LDR. This
4 is a highly industrialized portion of the river with relatively little remaining natural habitat for
5 juvenile salmon and little land available for addressing this habitat shortage. The restoration to
6 be implemented under this Consent Decree is particularly valuable because it provides high-
7 quality habitat for juvenile salmon in a reach of the LDR where such habitat is rare.

9 Considering the location and quality of the habitat provided by the proposed restoration under
10 the Consent Decree, the geographic extent of that habitat, and the advantages of achieving
11 restoration sooner and with more certainty than otherwise would be the case, the Trustees have
12 determined that the Vigor Shipyards Habitat Projects will provide sufficient restoration value to
13 compensate for Defendants' alleged liability.

15 K. Defendants deny all or portions of the allegations of the Complaint and all or
16 portions of the allegations contained in Paragraphs H through J of this Section, and dispute
17 Plaintiffs' methods for estimating total damages and Defendants' allocated share of those
18 damages. Defendants do not admit any liability to Plaintiffs arising out of the transactions or
19 occurrences alleged in the Complaint or in this Consent Decree.

21 L. Plaintiffs and Defendants (collectively, the "Parties" and, individually, a "Party")
22 agree that neither Plaintiffs nor Defendants will use this settlement (including the terms of this
23 Decree and the basis for the compromise contained in other documents filed in this action in
24 support of this Decree) in any other forum, whether in litigation, administrative proceedings,
25 formal or informal negotiations, or otherwise, to resolve, attempt to resolve, or in any way
26 influence the resolution of, other claims between Plaintiffs and Defendants in the LDR (as

1 defined below); provided, however, that this provision does not limit Plaintiffs or Defendants
2 from using otherwise available factual information referenced in documents filed in support of
3 this Decree. The restriction in the preceding sentence applies to, but is not limited to, claims
4 other than Covered Natural Resources Damages that the United States (on behalf of the United
5 States Environmental Protection Agency) and the State may have against Defendants under
6 CERCLA, the Solid Waste Disposal Act (as amended by the Resource Conservation and
7 Recovery Act), 42 U.S.C. § 6901 et seq., or MTCA in the LDR.

9 M. The Parties agree, and this Court by entering this Consent Decree finds, that this
10 Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid
11 prolonged and complicated litigation between the Parties, that this Decree will expedite the
12 restoration and protection of natural resources at and near the Lower Duwamish River and Elliot
13 Bay, that the timely implementation of the projects and payments to be provided under this
14 Decree constitute appropriate actions necessary to protect and restore the Natural Resources
15 allegedly injured by releases or threatened releases of hazardous substances or discharges of oil
16 by Defendants, that such timely actions and expenditures are adequate to redress Defendants'
17 responsibility for the Covered Natural Resource Damages that are the subject of this proceeding,
18 and that this Decree is fair, reasonable, and in the public interest.

19 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:
20

21 **III. JURISDICTION AND VENUE**

22
23
24 1. This Court has jurisdiction over the subject matter of this action pursuant to 28
25 U.S.C. §§ 1331, 1345 and 1367, 42 U.S.C. § 9613(b), and 33 U.S.C. § 2717(b). The Court has
26 personal jurisdiction over the Parties. Solely for the purposes of this Decree and the underlying
27 Complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the

1 Court or to venue in this District. The Parties shall not challenge the terms of this Decree or this
2 Court's jurisdiction to enter and enforce this Decree.

3 **IV. PARTIES BOUND**

4 2. This Decree is binding upon the United States, the State, the Suquamish Tribe, the
5 Muckleshoot Indian Tribe, and upon Defendants and their successors and assigns. Any change
6 in ownership or corporate or other legal status, including but not limited to any transfer of assets
7 or real or personal property, shall in no way alter the status or responsibilities of Defendants
8 under this Decree.

9
10 3. Defendants shall provide a copy of this Consent Decree to each contractor hired
11 by Defendants to perform any of the work required by this Consent Decree, and to each person
12 representing Defendants with respect to any such work, and shall condition all future contracts
13 entered into by Defendants hereunder upon performance of the work in conformity with the
14 terms of this Consent Decree. Defendants or their contractors shall provide written notice of the
15 Consent Decree to all subcontractors hired by Defendants' contractors to perform any portion of
16 the work. Defendants shall nonetheless be responsible for ensuring that all work performed by
17 its contractors and subcontractors is performed in accordance with this Consent Decree.
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20 **V. DEFINITIONS**

21 4. Unless otherwise expressly provided, terms used in this Decree that are defined in
22 CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in
23 CERCLA or in such regulations. Whenever the terms listed below are used in this Decree or in
24 any attached appendix, the following definitions will apply:
25

26 a. "As-built Drawings" means the set of drawings submitted by Defendants
27 regarding the completed West Waterway Habitat Bench Project and upon completion of the

1 Southwest Yard Habitat Project, which will reflect all changes made in the specifications and
2 working drawings during the construction process, and show the dimensions, geometry, and
3 location of all elements of the work completed pursuant to Appendix A.

4 b. “CERCLA” means the Comprehensive Environmental Response, Compensation,
5 and Liability Act of 1980, as amended, 42 U S C. § 9601, *et seq.*

6 c. “Consent Decree” or “Decree” means this Consent Decree and all attached
7 appendices identified in Section XXV (Integration/Appendices), and any final plans approved
8 hereunder. In the event of a conflict between this Consent Decree and any Appendix or plan, the
9 Consent Decree will control.
10

11 d. “Covered Natural Resource Damages” means damages, including costs of damage
12 assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607; Chapter 70.105D
13 RCW; Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002 of the
14 Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702(b) and any other statutory or common law,
15 for injury to, destruction of, loss of, loss of use of, or impairment of Natural Resources, including,
16 but not limited to: (i) the costs of assessing such injury, destruction, or loss or impairment of
17 natural resources; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost
18 natural resources or of acquisition of equivalent resources; (iii) the costs of planning such
19 restoration activities; (iv) compensation for injury, destruction, loss, impairment, diminution in
20 value, or loss of use of natural resources; and (v) each of the categories of recoverable damages
21 described in 43 C.F.R. § 11.15, and applicable State or tribal law, resulting from releases of
22 hazardous substances or discharges of oil to the LDR and/or Elliott Bay, or adjoining shorelines,
23 where such release or discharge occurred on or before the Effective Date of this Consent Decree,
24 at or from the property identified in Appendix B. Damages, injury to, destruction of, loss of, loss
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1 of use of, or impairment of Natural Resources resulting from releases of hazardous substances or
2 discharges of oil originating from Defendants' operations or activities outside of the property
3 identified in Appendix B are not included in Covered Natural Resource Damages, even if those
4 hazardous substances or discharges of oil reach the LDR by flowing over, under, or through any
5 portion of the property identified in Appendix B.

6
7 e. "Day" means a calendar day. In computing any period of time under this Consent
8 Decree, where the last day falls on a Saturday, Sunday, or federal holiday, the period of time will
9 run until the close of business of the next working day. "Working day" means a day other than a
10 Saturday, Sunday, or Federal holiday.

11 f. "Defendants" means Vigor Industrial LLC and Exxon Mobil Corporation.

12 g. "Discounted Service-Acre Year" or "DSAY" means the amount of a specific suite
13 of ecological services determined to be produced per acre of a given type of habitat over a period
14 of years, the total of which are discounted to a present value.

15
16 h. "Elliott Bay" means any portion of Elliott Bay (including the shoreline, intertidal
17 areas, tributaries, estuaries and bottom sediments) in the State of Washington where hazardous
18 substances originating from the property identified in the definition of Covered Natural Resource
19 Damages and Appendix B have come to be located.

20 i. "Exxon Mobil" shall mean Exxon Mobil Corporation.

21
22 j. "Lower Duwamish River" or "LDR" means any portion of the Duwamish
23 Waterway (including the shoreline, intertidal areas, tributaries, estuaries and bottom sediments) in
24 the State of Washington where hazardous substances originating from the properties identified in
25 the definition of Covered Natural Resource Damages and Appendix B have come to be located.

26 The LDR includes the in-waterway portions of three Superfund Sites: the Harbor Island Superfund
27

1 Site (located south of downtown Seattle, Washington, including the East Waterway and West
2 Waterway that flow from the south end of Harbor Island north to Elliott Bay), the Lower
3 Duwamish Waterway Superfund Site (approximately five miles of the Duwamish River from the
4 southern tip of Harbor Island south to the area around the Norfolk Combined Sewer
5 Overflow/Storm Drain in Tukwila, Washington), and the Lockheed West Superfund Site (areas in
6 and around the site formerly known as Lockheed Shipyard No. 2, located near the confluence of
7 the West Waterway and Elliott Bay).

9 k. "MTCA" means the Model Toxics Control Act, Chapter 70.105D RCW.

10 l. "Natural Resources" means that definition as provided in 42 U.S.C. § 9601(16).

11 m. "Parties" means the United States, the State of Washington, the Suquamish Tribe,
12 the Muckleshoot Indian Tribe, and Defendants.

13 n. "Plaintiffs" means the United States, the State, the Suquamish Tribe, and the
14 Muckleshoot Indian Tribe.

15 o. "Projects" or "Vigor Shipyards Habitat Projects" means all of the work and other
16 commitments as described in Appendix A.

17 p. "Project Sites" means the areas outlined for the Projects in Appendix A.

18 q. "Stewardship" means actions intended to preserve, protect or maintain the
19 Projects and the Project Sites as identified in Appendix A, including (a) maintaining, restoring or
20 replacing the ecological function of the Projects; and (b) maintaining, restoring or replacing
21 physical components of the Projects.

22 r. "Success Criteria" are the standards for performance of the Projects as specified
23 in the Scope of Work attached as Appendix A.

1 s. "Trustees" mean the United States Department of Commerce, acting through
2 NOAA; the United States Department of the Interior; the Washington State Department of
3 Ecology, on behalf of the State of Washington; the Suquamish Tribe; and the Muckleshoot
4 Indian Tribe.

5 t. "United States" shall mean the United States of America and each department,
6 agency and instrumentality of the United States, including the United States Department of
7 Commerce and the United States Department of the Interior.

8 u. "Vigor Industrial LLC" shall mean Defendant Vigor.

9 **VI. GENERAL PROVISIONS**

10 5. This Decree is not, and shall not be construed to be, a permit issued pursuant to
11 any law. All activities undertaken by Defendants pursuant to this Decree shall be performed in
12 accordance with the requirements of all applicable laws and permits. Where any portion of the
13 activities undertaken pursuant to this Decree requires a federal, state or local permit or approval,
14 Defendants shall submit timely and complete applications and take all other actions necessary to
15 obtain such permits or approvals. Defendants may seek relief under the provisions of Section
16 XV (Force Majeure) for any delay in or prevention of the performance of the obligations of this
17 Decree resulting from a failure to obtain, or a delay in obtaining, any federal or state permit or
18 approval required for such performance, including but not limited to the deadlines set forth in
19 Paragraph 10 and in Appendix A, provided that they have submitted timely and complete
20 applications and taken all other actions necessary to obtain all such permits or approvals.

21 6. Defendants shall ensure that all work performed under this Decree shall be
22 conducted as set forth in the Scope of Work attached as Appendix A hereto to achieve the
23 objective of constructing and maintaining the Projects to meet the Success Criteria identified in

1 Appendix A. If the Trustees determine that Defendants are not complying with the requirements
2 set forth in the Decree and Appendix A, the Trustees shall provide written notice to Defendants
3 specifying the basis for their determination of noncompliance. Defendants may correct the
4 noncompliance or invoke the dispute resolution procedures set forth in Section XIII. The
5 Trustees may require Defendants to take actions to alter, suspend or cease ongoing activities, and
6 to alter, postpone or refrain from taking proposed actions, as are necessary to ensure compliance
7 with the terms of this Decree and any plans or proposals adopted hereunder. If Defendants
8 dispute any such requirements imposed by the Trustees, Defendants may invoke the dispute
9 resolution procedures set forth in Section XIII.
10

11 7. Plaintiffs do not, by their consent to the entry of this Decree, warrant or aver in
12 any manner that Defendants' compliance with this Decree will result in compliance with
13 CERCLA or any other law. The Parties agree that Defendants are responsible for complying
14 with all applicable federal, state, tribal and local laws, regulations and permits.
15

16 8. All approvals and disapprovals made by the Trustees under this Consent Decree
17 shall be communicated to Defendants by one of the Trustees on behalf of all the Trustees.
18 Except as specifically provided otherwise herein, all such communications shall be in writing
19 and shall indicate that the communication is on behalf of all Trustees.
20

21 **VII. RESTORATION PROJECTS**

22 9. Defendants shall fund and perform all activities in accordance with the terms set
23 out in the Scope of Work attached as Appendix A for the two Vigor Shipyards Habitat Projects:
24 the West Waterway Habitat Bench Project (construction completed by Defendant Vigor in 2006,
25 to be monitored and maintained by Defendants pursuant to this Decree) and the Southwest Yard
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1 Habitat Project (to be designed, constructed, monitored and maintained by Defendants pursuant
2 to this Decree).

3 **Design and Construction Activities for the Southwest Yard Habitat Project**

4 10. Construction Schedule and Contingencies.

5 a. After completion of necessary design work for the Southwest Yard Habitat
6 Project, including timely submission of design reports to the Trustees for review as described in
7 Appendix A, and after the Trustees' approval in writing of the final design plan, Defendant
8 Vigor shall commence construction on the Project in accordance with the Schedule set forth in
9 Table 4 of Appendix A. The Trustees' written authorization will be provided after: (1) the
10 Trustees verify that EPA has reviewed and approved Defendants' Remedial Action Work Plan
11 (described in Appendix A) as appropriate and consistent with the requirements of: the CERCLA
12 consent decree entered in *United States of America v. Todd Pacific Shipyards Corp.* (W.D.
13 Wash.), Civil Action No. CV03-1179; and any response action decisions for the LDR that EPA
14 may have made or may or expects to make that may affect the Projects; and (2) other reviews
15 and determinations by the Trustees, including but not limited to those identified in Appendix A.

16 b. Defendants shall complete construction of the Southwest Yard Habitat Project
17 within sixty (60) months after the Effective Date of this Decree. If Defendants have not
18 completed construction within seventy-two (72) months after the Effective Date of this Decree,
19 then Defendants shall either (i) pay to the Trustees the sum of \$300,000 as compensation for the
20 additional delay in restoration of Natural Resources, or (ii) perform additional restoration work
21 outside of the Project Sites agreed upon in writing by Defendants and the Trustees. For each
22 subsequent twelve-month period in which Defendants have not completed construction of the
23 Projects, Defendants shall either (i) pay to the Trustees the sum of \$300,000 as compensation for
24

1 the additional delay in restoration of Natural Resources, or (ii) perform additional restoration
2 work outside of the Project Sites agreed upon in writing by Defendants and the Trustees.
3 Defendants' obligations under this subparagraph are in addition to any other obligations or
4 applicable penalties under this Decree, including Section XIV (Stipulated Penalties).

5 11. Within sixty (60) days after completion of all construction, installation or
6 enhancement activities for the Southwest Yard Habitat Project, pursuant to the approved final
7 design plan, such that the Project has been placed in operation and is expected to perform and
8 function as designed, Defendants shall submit As-Built Drawings with a written Notice of
9 Completion of Construction to the Trustees. The Trustees shall review the results of the
10 development of the Project to determine whether the Project has been constructed in accordance
11 with, and as designed to meet the Success Criteria set forth in, Appendix A. Within sixty (60)
12 days after receiving the Notice of Completion of Construction, the Trustees shall submit to
13 Defendants either (a) a written notice identifying specific deficiencies the Trustees determine
14 must be satisfied for the Project to be completed in accordance with Appendix A (Notice of
15 Deficiencies); or (b) a written notice of the Trustees' determination that the Project has been so
16 completed (Notice of Approval of Completion of Construction). The date of the Trustees'
17 Notice of Approval of Completion of Construction shall constitute the "Construction Completion
18 Date." Within sixty (60) days of receipt of a Notice of Deficiencies, or as otherwise agreed to in
19 writing by the Trustees, Defendants shall correct the identified deficiencies and complete the
20 Project in accordance with Appendix A, and submit to the Trustees an amended Notice of
21 Completion for review and response in accordance with this Paragraph. Any delay in
22 completing construction of the Project as a result of the operation of this Paragraph shall not in
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1 and of itself constitute grounds for relief from the requirement to pay compensation under
2 Paragraph 10(b) of this Section or stipulated penalties under Section XIV for compliance delays.

3 **Initial Maintenance and Monitoring of the Vegetation and Habitat of the Projects**

4 12. Concurrent with the submission of the Final Design Package, Defendants shall
5 develop and submit to the Trustees for their review and approval a Monitoring and Maintenance
6 Plan, as further described in Table 4 of Appendix A, to monitor and maintain the vegetation and
7 habitat of the Projects to meet the Success Criteria set forth in Appendix A for a period of ten
8 (10) years from the Construction Completion Date of the Southwest Yard Habitat Project,
9 including any needed Contingency Measures or Adaptive Management Plans as directed by the
10 Trustees. Upon completion of the ten-year period, Defendants shall provide written Notice of
11 Completion of Initial Maintenance and Monitoring Obligations to the Trustees in accordance
12 with Section XXII (Notices and Submissions). Within forty-five (45) days after receiving the
13 Notice of Completion of Initial Maintenance and Monitoring Obligations, the Trustees shall
14 submit to Defendants either (a) a written notice identifying specific deficiencies the Trustees
15 determine must be satisfied for the initial maintenance and monitoring obligations to be
16 completed in accordance with Appendix A (Notice of Deficiencies); or (b) a written notice of the
17 Trustees' determination that the initial maintenance and monitoring obligations are completed
18 (Approval of Completion of Initial Maintenance and Monitoring Obligations). In the event the
19 Trustees identify, in a Notice of Deficiencies, specific deficiencies with Defendants' compliance
20 with its obligations, Defendants shall correct the identified deficiencies and complete the
21 Projects in accordance with Appendix A. Within sixty (60) days of Defendants' receipt of a
22 Notice of Deficiencies from the Trustees, or as otherwise agreed to in writing by the Trustees,
23 Defendants shall complete all corrective actions and submit to the Trustees an amended Notice
24

1 of Completion of Initial Maintenance and Monitoring Obligations for review and response in
2 accordance with this Paragraph. The date of the Trustees' Approval of Completion of Initial
3 Maintenance and Monitoring Obligations for the Projects shall constitute the "Initial
4 Maintenance and Monitoring Obligations Completion Date."

5 **Long-term Stewardship of Developed Vegetation and Habitat for the Projects**

6
7 13. The Parties' intention is that the ecological functions provided by the Projects be
8 maintained in perpetuity. In order to achieve permanent preservation of the Project Sites, and all
9 ecological functions provided by the Projects be maintained in perpetuity, Defendant Vigor shall
10 grant and record environmental covenants for the Project Sites, including for its property, and
11 obtain necessary agreements to grant and record such environmental covenant(s) for any
12 property owned by any other party, including the State, in the form set forth in Appendix C for
13 Defendant Vigor's property, and in a form reviewed and approved by the Trustees for property
14 owned by any other party, including the State, and shall take all other appropriate actions
15 necessary to ensure that the Project Sites will not be used in a manner inconsistent with the
16 requirements of this Decree. Defendant Vigor shall grant and record such environmental
17 covenants within sixty (60) days of the Construction Completion Date for the Southwest Yard
18 Habitat Project.
19
20

21 14. Defendants shall be responsible for maintaining vegetation and other habitat
22 attributes, for controlling invasive vegetation and debris removal, and for undertaking corrective
23 actions to address any negative impacts to the Projects that affect the ecological services
24 provided by the Projects, as set forth more fully in Appendix A and the Maintenance and
25 Monitoring Plan approved by the Trustees. For purposes of this Decree, Defendants'
26 responsibility for active maintenance and corrective action of both Projects shall extend twenty
27

1 (20) years from the Initial Maintenance and Monitoring Obligations Completion Date, or sooner
2 if the Trustees agree that a “force majeure” event prevents corrective action or further
3 maintenance. Negative impacts identified in this Paragraph include events with a foreseeable
4 probability of occurrence (such as, for example, the beaching of an abandoned barge) but do not
5 include “force majeure” events.
6

7 15. Defendants shall be responsible for continued maintenance and corrective actions
8 for Projects in accordance with Paragraph 14, whether or not Defendant Vigor owns the Project
9 Sites. The Trustees recognize that the Project Sites may include some property that is owned by
10 other parties including, but not limited to, the State. Defendants recognize that they are solely
11 responsible for securing the cooperation of other property owners, including but not limited to
12 the State, in order to successfully complete and maintain the Projects in accordance with
13 Appendix A. Any inability of Defendants to successfully complete or maintain the Projects in
14 accordance with Appendix A resulting from disputes with other property owners, including but
15 not limited to the State, shall not constitute a “force majeure” event.
16
17

18 16. If Defendant Vigor transfers ownership of any property within the Project Sites
19 prior to the expiration of Defendants’ obligations in Paragraph 14, such transfer shall not affect
20 or lessen Defendants’ obligations under that Paragraph, or any other provision of this Decree,
21 and as a condition of any such transfer, the entity to which any property is transferred shall be
22 required to provide Defendants with all access necessary to fulfill Defendants’ responsibilities
23 under Paragraph 14. Within sixty (60) days prior to any proposed transfer of property within the
24 Project Sites, Defendant Vigor shall provide the Trustees with written notice of the proposed
25 transfer, identifying the entity that will own the property, certifying that Defendant Vigor
26
27

1 provided a copy of this Decree to such entity and providing a copy of the proposed access
2 agreement for review and approval by the Trustees.

3 **General Project Development Provisions**

4 17. Defendants shall not take any action that is inconsistent with this Decree and that
5 would adversely affect the Projects.

6 18. Defendants shall undertake all activities required by applicable law to address
7 cultural resource issues associated with the Projects, including, as applicable, consultation with
8 tribes and the Washington State Department of Archaeology and Historic Preservation,
9 conducting a background and project review by an archaeologist who meets the Department of
10 Interior's professional qualification standards at 36 C.F.R. Part 61, and conducting cultural
11 resource surveys or monitoring activities.
12

13 19. The Trustees may conduct additional work themselves, at their own expense, on
14 the Project Sites. If such work is conducted prior to completion of initial construction by
15 Defendants, the Trustees will conduct any such work in a manner that does not hinder
16 Defendants' timely completion of the Projects or otherwise interfere with the performance of
17 Defendants' obligations under this Decree. Prior to performing additional work pursuant to this
18 Consent Decree, the Trustees shall prepare and provide to Defendants a Health and Safety Plan.
19

20 **Financial Assurances**

21 20. Construction of the Southwest Yard Habitat Project. Based upon representations
22 and assurances made by Defendants, the Trustees have no reason to believe that Defendants
23 presently do not have the financial ability to perform their obligations under Paragraph 10 of this
24 Decree to construct the Southwest Yard Habitat Project. On the first anniversary of the Effective
25 Date, Defendants shall demonstrate their financial ability to discharge their obligations by
26

1 submitting to the Trustees copies of Defendant Exxon Mobil's most recent Form 10-K Annual
2 Report and equivalent annual financial information for Defendant Vigor. Each year thereafter
3 until the Trustees issue a Notice of Approval of Construction Completion in accordance with
4 Paragraph 10, Defendants shall submit their most recent Form 10-K Annual Report or annual
5 financial information to the Trustees within 30 days after filing of such report or completion of
6 such information.
7

8 21. In the event that the Trustees determine that the financial representations and
9 assurances provided by the Form 10-K Annual Reports and/or other information available to
10 them do not demonstrate Defendants' ability to complete construction of the Project, then
11 Defendants shall establish and maintain financial assurance in the amount then needed to fulfill
12 their remaining obligations to construct the Project in one or more of the mechanisms listed
13 below, and satisfactory to the Trustees. Defendants may use multiple mechanisms only if the
14 mechanisms used in combination are limited to surety bonds guaranteeing payment, letters of
15 credit, trust funds, and/or insurance policies:
16
17

18 a. A surety bond guaranteeing construction of the Project that is issued by a
19 surety company among those listed as acceptable sureties on federal bonds as set forth in
20 Circular 570 of the U.S. Department of the Treasury;
21

22 b. An irrevocable letter of credit, payable to or at the direction of the
23 Trustees, that is issued by an entity that has the authority to issue letters of credit and
24 whose letter-of-credit operations are regulated and examined by a federal or state agency;
25

26 c. A trust fund established for the benefit of the Trustees that is administered
27 by a trustee for the fund (and where the trustee for the fund is not a "Trustee" as defined

1 in Paragraph 4.s) that has the authority to act as a trustee for the fund and whose trust
2 operations are regulated and examined by a federal or state agency;

3 d. A policy of insurance that provides the Trustees with acceptable rights as
4 beneficiaries thereof and that is issued by an insurance carrier that has the authority to
5 issue insurance policies in the applicable jurisdiction and whose insurance operations are
6 regulated and examined by a federal or state agency;

7
8 e. A demonstration that Defendants meet the relevant financial test criteria of
9 40 C.F.R. § 264.143(f); or
10

11 f. A guarantee to construct the Project executed in favor of the Trustees by
12 one of the following: (1) a direct or indirect parent company of a Defendant; or (2) a
13 company that has a “substantial business relationship” (as defined in 40 C.F.R. §
14 264.143(h)) with a Defendant; provided, however, that any company providing such a
15 guarantee must demonstrate to the Trustees’ satisfaction that it meets the relevant
16 financial test criteria of 40 C.F.R. § 264.143(f).
17
18

19 22. Escrow Account for Monitoring, Maintenance and Long-term Stewardship of the
20 Projects. In order to ensure Defendants’ completion of its maintenance, monitoring and long-
21 term Stewardship requirements set forth in this Section, within forty-five (45) days of the
22 Trustees’ authorization to commence construction pursuant to Paragraph 10 of this Decree,
23 Defendants shall establish an Escrow Account for Maintenance, Monitoring and Long-term
24 Stewardship of the Restoration Projects in the amount of \$300,000 and in the form set forth in
25
26
27

1 Appendix D, and shall maintain such Escrow Account until released as set forth in this Section,
2 such that the Escrow Account is legally binding and fully effective.

3 23. Defendants shall diligently monitor the adequacy of the Escrow Account and any
4 financial assurance mechanism required by Paragraph 21. If any Defendant becomes aware of
5 any information indicating that the amount or form of the Escrow Account or any financial
6 assurance mechanism required by Paragraph 21 is inadequate or otherwise no longer satisfies the
7 requirements of this Section, such Defendant shall notify the Trustees of such information within
8 seven (7) days. If the Trustees determine that the amount or terms of the Escrow Account or any
9 financial assurance mechanism required by Paragraph 21 is inadequate or otherwise no longer
10 satisfies the requirements of this Section, the Trustees will provide written notice to the
11 Defendants of such determination. Defendants shall, within thirty (30) days after notifying the
12 Trustees or receiving written notice from the Trustees under this Paragraph, secure and submit to
13 the Trustees for approval a proposal for a revised Escrow Account or financial assurance
14 mechanism required by Paragraph 21 that satisfies the requirements of this Section. The Trustees
15 may extend this deadline for such time as is reasonably necessary for the Defendants, in the
16 exercise of due diligence, to secure and submit to the Trustees a proposal for a revised Escrow
17 Account or financial assurance mechanism not to exceed sixty (60) days. Defendants shall follow
18 the procedures of Paragraph 24 in seeking approval of, and submitting documentation for, the
19 revised Escrow Account or financial assurance mechanism. Defendants' inability to secure
20 financial assurance in accordance with this Section does not excuse performance of any other
21 obligation under this Decree.
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1 24. Modification of Amount, Form, or Terms of the Escrow Agreement or Financial
2 Assurance Mechanism (if required by Paragraph 21). Defendants may submit, on any
3 anniversary of the Effective Date of this Decree or at any other time agreed to by the Parties, a
4 request to reduce the amount, or change the form or terms, of the Escrow Account or any
5 financial assurance mechanism required by Paragraph 21. Any such request must be submitted to
6 the Trustees in accordance with this Section, and must include an estimate of the cost of the
7 remaining work, an explanation of the bases for the cost calculation, and a description of the
8 proposed changes, if any, to the form or terms of the Escrow Account or financial assurance
9 mechanism. The Trustees will notify Defendants in writing of their decision to approve or
10 disapprove a requested reduction or change pursuant to this Paragraph. Defendants may reduce
11 the amount of the Escrow Account or financial assurance mechanism only in accordance with:
12 (a) the Trustees' approval; or (b) if there is a dispute, the agreement or final judicial decision
13 resolving such dispute under Section XIII (Dispute Resolution). Defendants may change the
14 form or terms of the Escrow Account or financial assurance mechanism only in accordance with
15 the Trustees' approval. Any decision made by the Trustees on a request submitted under this
16 Paragraph to change the form or terms of the Escrow Account or financial assurance mechanism
17 shall not be subject to challenge by Defendants pursuant to the dispute resolution provisions of
18 this Decree or in any other forum. Within thirty (30) days after receipt of the Trustees' approval
19 of, or the agreement or decision resolving a dispute relating to, the requested modifications
20 pursuant to this Paragraph, Defendants shall submit to the Trustees documentation of the
21 reduced, revised, or alternative Escrow Account or financial assurance mechanism.
22
23
24
25

26 25. Access to the Escrow Account or Financial Assurance (if required by
27 Paragraph 21).
28

1 a. If the Trustees determine that Defendants have ceased, or are seriously late
2 or deficient in performing, the monitoring, maintenance and long-term Stewardship obligations
3 for the Projects set forth in this Section then, in accordance with Paragraph 22 the Trustees are
4 entitled to: (1) implementation of the monitoring, maintenance and long-term Stewardship
5 obligations for the Projects set forth in this Section and/or (2) require that any funds guaranteed
6 be paid in accordance with Paragraph 25(e). If a financial assurance mechanism is required under
7 Paragraph 21, and the Trustees determine that Defendants have ceased, or are seriously late or
8 deficient in constructing the Southwest Yard Habitat Project, in accordance with Paragraph 21
9 the Trustees are entitled to: (1) completion of construction of the Project as set forth in this
10 Decree, including Appendix A and/or (2) require that any funds guaranteed be paid in
11 accordance with Paragraph 25(e).
12
13

14 b. If the Trustees make such determination under Paragraph 25(a), the
15 Trustees may issue a written notice (“Access to Escrow or Access to Financial Assurance
16 Notice”) to Defendants. Any Access to Escrow or Access to Financial Assurance Notice issued
17 by the Trustees will specify the grounds upon which such notice was issued and will provide
18 Defendants an opportunity to remedy the deficiencies specified in the Notice. Defendants shall
19 remedy, to the Trustees’ satisfaction, the deficiencies set forth in the Notice within fifteen (15)
20 days of receipt of such notice.
21
22

23 i. If Defendants have not remedied to the Trustees’ satisfaction the
24 deficiencies set forth in the Notice within fifteen (15) days of Defendants’ receipt
25 of such notice, the Trustees may at any time thereafter exercise their right of
26 Access to the Escrow Account or financial assurance mechanism required by
27

1 Paragraph 21 pursuant to this Section as the Trustees deem necessary to
2 implement the monitoring, maintenance and long-term Stewardship obligations or
3 complete construction of the Southwest Yard Habitat Project.

4
5 ii. Except as specifically provided elsewhere in this Decree, Defendants may
6 invoke the procedures set forth in Section XIII (Dispute Resolution), to dispute
7 the Trustees' exercise of their right of Access to the Escrow Account or financial
8 assurance mechanism required by Paragraph 21 under this Paragraph. However,
9 notwithstanding Defendants' invocation of such dispute resolution procedures,
10 and during the pendency of any such dispute, the Trustees may in their sole
11 discretion commence and continue to exercise their right of Access to the Escrow
12 Account or financial assurance mechanism until the earlier of (1) the date that
13 Defendants remedy, to the Trustees' satisfaction, the circumstances giving rise to
14 the Trustees' issuance of the Access to Escrow or Access to Financial Assurance
15 Notice, or (2) the date that a final decision is rendered in accordance with Section
16 XIII (Dispute Resolution) requiring the Trustees to terminate such exercise of
17 their right of Access to the Escrow Account or financial assurance mechanism.
18 Following either event, the Trustees shall cease obligating any further funds from
19 the Escrow Account or financial assurance mechanism, unless the final Dispute
20 Resolution decision allows the Trustees to continue obligating or spending funds,
21 but shall not be required to repay any funds already obligated or spent by the
22 Trustees.
23
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1 c. If the Trustees are notified by the escrow agent as appointed under the
2 Escrow Account required by Paragraph 22, or any financial assurance mechanism required by
3 Paragraph 21, that it intends to resign and/or cancel the Escrow Account or financial assurance
4 mechanism required by Paragraph 21, and the Defendants fail to provide an alternative Escrow
5 Account or financial assurance mechanism in accordance with Paragraph 23 at least thirty (30)
6 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid in
7 full to the Trustees prior to cancellation in accordance with Paragraph 25(e).
8

9
10 d. If, upon issuance of an Access to Escrow Account or Access to Financial
11 Assurance Notice by the Trustees, the Trustees are unable for any reason to promptly secure the
12 resources guaranteed under the Escrow Account or financial assurance mechanism, whether in
13 cash or in kind, to continue and complete the Projects, then the Trustees are entitled to demand
14 an amount, as determined by the Trustees, sufficient to cover the cost of the remaining work to
15 be performed. Defendants shall, within fourteen (14) days of such demand, pay the amount
16 demanded as directed by the Trustees.
17

18
19 e. Any amounts required to be paid under this Paragraph shall be, as directed
20 by the Trustees: (i) paid to the Trustees in order to facilitate the completion of the work by the
21 Trustees or by another person; or (ii) deposited into an interest-bearing account, established at a
22 duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the
23 completion of the work by another person.
24

25 26. Release, Cancellation, or Discontinuation of the Escrow Account or Financial
26 Assurance Mechanism (if required by Paragraph 21). Defendants shall not release, cancel, or
27 discontinue the Escrow Account or financial assurance mechanism, except as provided pursuant
28

1 to this Paragraph, and as set forth in Appendix D. Defendants may release, cancel, or
2 discontinue the Escrow Account or financial assurance mechanism only: (a) after the expiration
3 of the time period set forth in Paragraph 14 for the Escrow Account required by Paragraph 22,
4 and after the Construction Completion Date for the financial assurance mechanism if required by
5 Paragraph 21, and in accordance with the Trustees' written notice of approval of such release,
6 cancellation, or discontinuation; or (b) if there is a dispute regarding the release, cancellation or
7 discontinuance of the Escrow Account or financial assurance mechanism, in accordance with the
8 agreement or final judicial decision resolving such dispute under Section XIII (Dispute
9 Resolution).

12 **VIII. ACCESS TO INFORMATION AND PROJECT SITES**

13
14 27. To facilitate the Trustees' oversight responsibilities, Defendant Vigor will provide
15 the Trustees full access to the Project Sites for purposes of inspecting or observing Defendants'
16 progress in implementing the Projects required under this Decree.

17 28. Commencing upon the date of lodging of this Decree, and in accordance with
18 Appendix C, Defendant Vigor agrees to provide the Trustees and their contractors access at all
19 reasonable times to the Project Sites and to any property under the control of Defendant Vigor to
20 which access is required for the oversight or implementation of this Decree. This right of access
21 does not include a right to enter buildings. The Trustees shall give notice prior to access. Each
22 Trustee shall have the authority to enter freely and move about such property at all reasonable
23 times for purposes of overseeing the requirements of this Decree, including, but not limited to:

24 a. Monitoring and assessing progress on the planning, development, maintenance
25 and monitoring of the Projects;

- 1 b. Verifying any data or information submitted to the Trustees;
- 2 c Inspecting and copying records, operation logs, contracts or other documents
- 3 maintained or generated by Defendants or their contractors hereafter retained to perform work
- 4 undertaken pursuant to this Decree;
- 5 d. Conducting such tests, investigations or sample collections as deemed necessary
- 6 to monitor compliance with this Decree, investigate or assess contamination at or near the
- 7 Project Sites, or to assist in further identifying and quantifying natural resource injuries requiring
- 8 restoration actions and in planning and carrying out further restoration actions;
- 9 e. Performing work at the Project Site in accordance with Paragraph 19.
- 10 29. Plaintiffs may direct that Defendants use a camera, sound recording device or
- 11 other type equipment to record the work done under this Decree or injury to natural resources
- 12 and provide copies of any such recordings to the Trustees. Trustees may also use their own
- 13 camera, sound recording device, or other type equipment to record the work done under this
- 14 Decree or injury to natural resources. Defendants may request a copy of any such recordings
- 15 made by the Trustees provided it is not otherwise privileged.
- 16
- 17
- 18

19 **IX. SELECTION OF CONTRACTORS**

20 30. The selection of any contractor hereafter retained by Defendants to perform any

21 of the work required under this Consent Decree shall be subject to Trustee approval. Defendants

22 shall notify the Trustees in writing of the name, title and qualifications of any contractor

23 Defendants propose to retain, and of any proposed changes in the selection of a contractor. The

24 Trustees will notify Defendants in writing of the approval or disapproval of a proposed

25 contractor. The Trustees' assent to the proposed selection or change of a contractor may be

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27

1 presumed unless the Trustees notify Defendants in writing of their objection to the proposed
2 selection or change within thirty (30) days of Defendants' written selection notice.

3 **X. REIMBURSEMENT OF RESTORATION IMPLEMENTATION COSTS**

4 31. Defendants agree to reimburse the Trustees' costs incurred in implementing and
5 overseeing the Projects described in Appendix A to this Decree. The period during which the
6 Trustees will incur implementation costs ends on the ending date of Defendants' responsibility
7 for active maintenance and corrective action, as set forth in Paragraph 14. Defendants shall
8 reimburse these costs as follows: Each year, beginning on the Effective Date of this Decree, the
9 Trustees shall provide Defendants with an invoice detailing their costs through the prior calendar
10 year of implementing and overseeing the Projects and provide a non-binding estimate of the
11 Trustees' anticipated costs for the next one-year period. Within sixty (60) days of receipt of the
12 Trustees' invoice, Defendants shall reimburse the Trustees for those costs. Defendants shall
13 make all such payments as directed by the Trustees, and provide notice of such payments, in
14 accordance with Section XVI (Notices and Submissions). If Defendants believe that any of the
15 Trustees' invoiced costs were not incurred in implementing and overseeing the Projects,
16 Defendants may invoke the Dispute Resolution provisions of Section XIII as to the disputed
17 costs only; any costs for which Defendants do not invoke Dispute Resolution shall be paid within
18 sixty (60) days of receipt of the Trustees' invoice.

22 **XI. PAST ASSESSMENT COST REIMBURSEMENT**

23 32. Within thirty (30) days of the Effective Date of this Decree, Defendants will pay a
24 total of \$815,816.59 for past assessment costs incurred by the Trustees (for NOAA and DOI
25 through September 28, 2019; for the State, through September 30, 2019; and for the Suquamish
26 Tribe, through November 15, 2018), as described below.

1 a. Payment for Assessment Costs Incurred by the United States.

2 (1) Within thirty (30) days after the Effective Date, Defendants shall pay a total of
3 \$754,976.21 to the United States for assessment costs incurred by the United States. Payment shall
4 be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account,
5 in accordance with instructions provided to Defendants by the Financial Litigation Unit (“FLU”)
6 of the United States Attorney’s Office for the Western District of Washington after the Effective
7 Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection
8 System (“CDCS”) number, which Defendants shall use to identify all payments required to be
9 made in accordance with this Decree. The FLU will provide the payment instructions to:
10

11
12 Alan Sprott
13 Vice President
14 Vigor Industrial LLC
15 5555 N. Channel Avenue
16 Portland, OR 97217
17 (503) 247-1828
18 Alan.Sprott@vigor.net

19 on behalf of Defendants. Defendants may change the individuals to receive payment instructions
20 on their behalf by providing written notice of such change to the United States in accordance with
21 Section XVI (Notices and Submissions).

22 (2) Of the total amount to be paid by Defendants pursuant to this
23 Subparagraph 32.a.(1):

- 24 (a) \$172,210.86 shall be deposited in the DOI NRDAR Fund, to be applied toward
25 natural resource damage assessment costs incurred by DOI.
- 26 (b) \$582,765.35 shall be deposited in the NOAA DARR Fund, to be applied toward
27 natural resource damage assessment costs incurred by NOAA.

1 b. Payment for Assessment Costs Incurred by the State. Within thirty (30) days after
2 the Effective Date, Defendants shall pay a total of \$40,400.90 to the State of Washington for
3 assessment costs incurred by the State. Payment shall be made by certified check, bearing the
4 notation “Natural Resource Damage assessments costs applied to accounts Todd Hi NRDA is
5 1T321 and EB Trustee Council 1T323” and made payable and addressed as follows:
6

7 Payee: State of Washington/Department of Ecology
8 Address: State of Washington/Department of Ecology
9 Attention: Cashiering Unit
 P.O. Box 47611
 Lacey, WA 98504-7611
10

11 c. Payment for Assessment Costs Incurred by the Suquamish Tribe. Within thirty (30)
12 days after the Effective Date, Defendants shall pay a total of \$20,439.48 to the Suquamish Tribe
13 for assessment costs incurred by the Tribe. Payment shall be made by check to the Suquamish
14 Tribe bearing the notation “Lower Duwamish River NRDA” and mailed to the address as follows:

15 Address: Suquamish Tribe
16 Attention: Finance Director
17 P.O. Box 498
 Suquamish, WA 98392

18 33. Payment for Interim Costs. The Trustees shall provide Defendants with a bill
19 requiring payment of costs incurred by the Trustees after the dates identified in Paragraph 32
20 through the Effective Date of the Consent Decree. Within 30 days of receiving the bill requiring
21 payment of costs from the Trustees, Defendants shall pay the costs in accordance with the
22 procedures set forth in Paragraphs 32.a-d and 34.
23

24 34. At the time of each payment pursuant to Paragraphs 32 and 33, Defendants will
25 send notice that payment has been made to the Trustees and DOJ in accordance with Section XVI
26
27

(Notices and Submissions). Such notice will reference Lower Duwamish River NRDA, DOJ case number 90-11-3-07227/4 and the civil action number.

XII. INTEREST ON LATE PAYMENTS

35. If Defendants fail to make any payment pursuant to this Decree by the required due date, in addition to the stipulated penalties as set forth in Section XIV, interest shall be assessed at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Interest on late payments shall accrue beginning on the date of lodging of the Decree through the date on which the payment is made.

XIII. DISPUTE RESOLUTION

36. Unless otherwise expressly provided for in this Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree.

37. Any dispute which arises under or with respect to this Decree shall in the first instance be the subject of informal negotiations between the Trustees and Defendants. The period for informal negotiations shall not exceed twenty-one (21) days from the time the dispute arises, unless the parties to the dispute agree otherwise in writing. The dispute shall be considered to have arisen when the Trustees send Defendants a written notice specifying the nature of the dispute and requested relief ("Notice of Dispute") or Defendants send the Trustees a written Notice of Dispute.

1 38. a. If the Parties cannot resolve a dispute by informal negotiations under the
2 preceding Paragraph, then the position advanced by the Trustees shall be considered binding
3 unless, within twenty-one (21) days after the conclusion of the informal negotiation period (i.e.,
4 forty-two (42) days after the date of the Notice of Dispute) Defendants invoke the formal dispute
5 resolution procedures of this Section by serving on the Trustees a written Statement of Position
6 on the matter in dispute, including, but not necessarily limited to, any factual data, analysis or
7 opinion supporting that position and any supporting documentation relied upon by Defendants.
8

9 b. Within twenty-one (21) days after receipt of Defendants' Statement of
10 Position, the Trustees shall serve on Defendants their written Statement of Position, including,
11 but not necessarily limited to, any factual data, analysis or opinion supporting that position and
12 all supporting documentation relied upon by the Trustees. Within twenty-one (21) days after
13 receipt of the Trustees' Statement of Position, Defendants may submit a Reply. If Defendants
14 submit a Reply, within twenty-one (21) days of receipt of the Reply, the Trustees shall issue a
15 Revised Statement of Position or provide written notice to the Defendants that the Trustees'
16 Statement of Position is final.
17
18

19 c. An administrative record of the dispute shall be maintained by the
20 Trustees and shall contain all Statements of Position, including supporting documentation,
21 submitted pursuant to this Section.
22

23 d. The Trustees' Statement of Position or Revised Statement of Position
24 shall be binding upon Defendants unless, within twenty-one (21) days after receipt of the
25 Trustees' Statement of Position or Revised Statement of Position (or Notice that the Statement
26 of Position is final), whichever is later, Defendants file with the Court and serve on the Parties in
27 accordance with Section XXII (Notices and Submissions) a motion for judicial review of the
28

1 decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief
2 requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly
3 implementation of the Decree. The motion shall also include any supporting factual data,
4 analysis, opinion, or documentation. The Trustees may file a response to Defendants' motion,
5 and Defendants may file a reply, in accordance with the schedule set forth in the Local Rules for
6 the Western District of Washington. The foregoing sentence notwithstanding, the Parties
7 acknowledge that disputes may arise that require judicial resolution on an expedited basis. In
8 such cases, the Parties shall agree on an expedited schedule or, absent prompt agreement, any
9 Party to the dispute may petition the Court for the imposition of an expedited schedule.
10

11 e. The Court may rule based on the administrative record (including the
12 Trustees' and Defendants' Statements of Position and Replies), with or without oral argument,
13 and shall review the Trustees' Statements of Position or its resolution of the dispute under the
14 standards of the Administrative Procedures Act.
15

16 f. Except as expressly stated elsewhere in this Decree, any matter in dispute
17 shall be reviewable by this Court.
18

19 39. The invocation of formal Dispute Resolution procedures under this Section shall
20 not extend, postpone, or affect in any way any obligation of Defendants under this Decree, not
21 directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated Penalties with
22 respect to the disputed matter shall continue to accrue, but payment otherwise required under
23 Section XIV shall be stayed pending resolution of the dispute. Notwithstanding the stay of
24 payment, Stipulated Penalties shall continue to accrue from the first day of noncompliance with
25 any applicable provision of this Decree. In the event that the Defendants do not prevail on the
26 disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section XIV.
27

XIV. STIPULATED PENALTIES

40. Late Payments by Defendants. Defendants shall pay a stipulated penalty of \$5,000 per day that each payment pursuant to Section X (Reimbursement of Restoration Implementation Costs) or Section XI (Reimbursement of Past Assessment Costs) is not made by the required due date.

41. Failure to Meet Deadlines or Satisfy Requirements of the Decree. The Parties stipulate that the time period for implementing the Projects is a significant factor in the settlement reached in this Decree and that delay in carrying out the activities required in this Decree may diminish the compensatory value attributable to those activities. Consequently, in the event that Defendants fail to meet a deadline or satisfy other requirements in this Decree (subject to any modifications agreed to under Section XXIII), including those set forth in Appendix A, and any delay is not excused through operation of the provisions of Section IX (Force Majeure), then Defendants shall pay stipulated penalties as follows:

- a. For each week that Defendants fail to comply with any requirement in the Decree (other than payments due pursuant to Sections X and XI, addressed in Paragraph 40 above), Defendants shall pay a stipulated penalty in the amount of \$1,500 per week;
- b. Where the delay or noncompliance extends beyond two weeks, the stipulated penalty of \$1,500 shall apply per day to each additional day of delay or noncompliance for each such missed requirement.

For purposes of this Subparagraph, a week shall equal a continuous period of seven (7) days.

Nothing in this Decree prevents the simultaneous accrual of separate penalties for separate violations of this Decree. Stipulated penalties under this Paragraph are in addition to the

1 remedies available under Paragraph 10(b) and Paragraph 25 (Access to Escrow Account or
2 Financial Assurance (if required by Paragraph 21)).

3 42. All penalties shall begin to accrue on the day after the complete performance or
4 payment is due or the day a violation occurs, and shall continue to accrue through the final day
5 of the payment, correction of the noncompliance or completion of the activity. Following the
6 Trustees' determination that Defendants have failed to comply with a requirement of this Decree,
7 the Trustees shall give Defendants written notification of the same and describe the
8 noncompliance. The Trustees shall send Defendants a written demand for the payment of the
9 penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of
10 whether the Trustees have notified Defendants of the violation.
11

12 43. Payments under this Section shall be made as follows: 40% of the total to the United
13 States; 20% of the total to the State; 20% of the total to the Suquamish Tribe; and 20% of the total
14 to the Muckleshoot Indian Tribe. All payments for stipulated penalties to the United States will
15 be deposited by EFT to the United States Treasury in accordance with Paragraph 32.a.(1).
16 Payments for stipulated penalties to the State or the Tribes shall be paid in accordance with the
17 procedures set forth in Paragraph 32. At the time of each payment, Defendants will send notice
18 that payment has been made to the Trustees and DOJ in accordance with Section XVI (Notices
19 and Submissions). This notice will reference Lower Duwamish River NRDA, DOJ Case Number
20 90-11-3-07227/4, and the civil action number.
21

22 44. All penalties accruing under this Section shall be due and payable within thirty
23 (30) days of Defendants' receipt from the Trustees of a demand for payment of the penalties,
24 unless Defendants invoke the Dispute Resolution procedures under Section XIII (Dispute
25 Resolution).
26

1 45. Defendants may dispute the Trustees' right to the penalties identified under
2 Paragraph 41 above by invoking the procedures of Section X (Dispute Resolution). Penalties
3 identified for late payments under Paragraph 40 above are not subject to Section XIII (Dispute
4 Resolution).

5 46. If Defendants fail to pay stipulated penalties when due, Plaintiffs may institute
6 proceedings in this Court to collect the penalties, as well as interest. Defendants shall pay
7 Interest on the unpaid balance, which shall begin to accrue on the day after payment or complete
8 performance is due.
9

10 47. If Plaintiffs bring a motion to enforce this Decree and prevail, Plaintiffs shall be
11 entitled to recover from Defendants their reasonable costs of such motion or action, including,
12 but not limited to, costs of attorney time.
13

14 48. Penalties shall continue to accrue as provided in Paragraph 42 during any dispute
15 resolution period, but need not be paid until the following:
16

17 a. If the dispute is resolved by agreement or by a decision of the Trustees that is not
18 appealed to this Court, accrued penalties determined to be owing shall be paid to the Trustees
19 within fifteen (15) days of the agreement or the receipt of the Trustees' decision or order;

20 b. If the dispute is appealed to this Court and the Trustees prevail in whole or in part,
21 Defendants shall pay all accrued penalties determined by the Court to be owed to the Trustees
22 within sixty (60) days of receipt of the Court's decision or order, except as provided in
23 Subparagraph (c) below;
24

25 c. If the District Court's decision is appealed by any Party, Defendants shall pay all
26 accrued penalties determined by the District Court to be owing to the Trustees into an interest-
27 bearing escrow account within sixty (60) days of receipt of the Court's decision or order.

1 Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days.

2 Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall
3 pay the balance of the account to the Trustees or to Defendants to the extent that they prevail.

4 49. Payments made under this Section are in addition to any other remedies or
5 sanctions available to Plaintiffs by virtue of Defendants' failure to comply with the requirements
6 of this Decree.
7

8 50. Notwithstanding any other provision of this Section, Plaintiffs may, in their
9 unreviewable discretion, waive payment of any portion of the stipulated penalties that have
10 accrued pursuant to this Decree. The payment of penalties shall not alter in any way Defendants'
11 other obligations under this Decree.
12

13 **XV. FORCE MAJEURE**

14 51. "Force majeure," for purposes of this Consent Decree, is defined as any event
15 arising from causes beyond the control of Defendants (including Defendants' contractors and
16 sub-contractors, and any other entity controlled by Defendants) that delays or prevents the
17 performance of any obligation under this Decree despite Defendants' best efforts to fulfill the
18 obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation"
19 includes using best efforts to anticipate any potential force majeure event and using best efforts
20 to address the effects of any potential force majeure event (1) as it is occurring and (2) following
21 the potential force majeure event, such that the delay is minimized to the greatest extent possible.
22 The requirement that Defendants exercise "best efforts to fulfill the obligation" also includes,
23 where necessary, the filing of legal actions to compel contract performance in accordance with
24 the design and schedule approved by the Trustees herein." Force majeure" does not include
25
26
27

1 financial inability to fulfill any obligation under this Decree or the failure to achieve Success
2 Criteria for the Projects.

3 a. If any event occurs or has occurred that may delay the performance of any
4 obligation under this Decree, whether or not caused by a force majeure event, Defendants shall
5 notify the Trustees within fourteen (14) days of when Defendants first knew that the event might
6 cause a delay. Within thirty (30) days after notifying the Trustees, Defendants shall provide a
7 written explanation and description of the reasons for the delay; the anticipated duration of the
8 delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for
9 implementation of any measures to be taken to prevent or mitigate the delay or the effect of the
10 delay; and the rationale for attributing such delay to a force majeure event (if Defendants intend
11 to assert such a claim). Defendants shall be deemed to know of any circumstance of which
12 Defendants, any entity controlled by Defendants, or Defendants' contractors or subcontractors
13 knew or should have known. Defendants shall include with any notice all available
14 documentation supporting its claim that the delay was attributable to a force majeure event.
15 Failure to comply with the above requirements will preclude Defendants from asserting any
16 claim of force majeure for that event, provided, however, that if the Trustees, despite the late or
17 incomplete notice, are able to assess to their satisfaction whether the event is a force majeure
18 event under this Paragraph, and whether Defendants exercised best efforts under this Paragraph,
19 the Trustees may, in their unreviewable discretion, excuse in writing Defendants' failure to
20 submit timely or complete notices under this Paragraph.

21 b. If the Trustees agree that the delay or anticipated delay is attributable to a
22 force majeure event, the time for performance of the obligations under this Decree that are
23 affected by the force majeure event will be extended by the Trustees for such time as is

1 necessary. An extension of the time for performance of the obligations affected by the force
2 majeure event shall not, of itself, extend the time for performance of any other obligation. If the
3 Trustees do not agree that the delay or anticipated delay has been or will be caused by a force
4 majeure event, the Trustees will notify Defendants in writing of their decision.

5 c. If Defendants elect to invoke the Dispute Resolution procedures set forth
6 in Section XIII, above, regarding a claimed force majeure event it shall do so no later than fifteen
7 (15) days after receipt of the Trustees' notice of disagreement. In any such proceeding
8 Defendants shall have the burden of demonstrating by a preponderance of the evidence that the
9 delay or anticipated delay has been or will likely be caused by a force majeure event, that the
10 duration of the delay or the extension sought was or will be warranted under the circumstances,
11 that Defendants exercised best efforts to fulfill the obligation in question, that best efforts were
12 exercised to avoid and mitigate the effects of the delay, and that Defendants complied with the
13 requirements of this Paragraph. If Defendants carry this burden, the delay at issue shall be
14 deemed not to be a violation by Defendants of the affected obligation of this Decree.

15 **XVI. INDEMNIFICATION; INSURANCE**

16 52. a. Plaintiffs do not assume any liability by entering into this Decree.
17 Defendants shall indemnify and hold harmless each of the Plaintiffs and/or their agents,
18 employees and representatives from any and all damage claims or causes of action arising from
19 negligent or other wrongful acts or omissions of Defendants and/or its officers, employees,
20 agents, contractors, subcontractors, representatives and any persons acting on its behalf or under
21 its control in carrying out activities pursuant to this Decree. Further, Defendants agree to pay
22 Plaintiffs all costs Plaintiffs incur, including but not limited to attorneys' fees and other expenses
23 of litigation and settlement, arising from or on account of claims made against Plaintiffs based on
24

1 negligent or other wrongful acts or omissions of Defendants or their officers, employees, agents,
2 contractors, subcontractors, representatives and any persons acting on its behalf or under its
3 control, in carrying out activities pursuant to this Decree. None of the Plaintiffs shall be held out
4 as a party to any contract entered into by or on behalf of Defendants in carrying out activities
5 pursuant to this Decree. Neither Defendants nor any contractor or representative of Defendants
6 shall be considered an agent of any Plaintiff, and Defendants shall require any contractor
7 hereafter retained by Defendants who performs work for Defendants in carrying out activities
8 pursuant to this Consent Decree to affirmatively acknowledge that it is not acting as an agent of
9 any Plaintiff.
10

11 b. Plaintiffs shall give Defendants written notice of any claim for which one
12 or more Plaintiffs plan to seek indemnification pursuant to Paragraph 52(a), and shall consult
13 with Defendants (including, but not limited to, responding to Defendants' reasonable requests for
14 information regarding any proposed settlement of that claim) prior to settling such claim.
15

16 53. Defendants waive all claims against Plaintiffs for damages or reimbursement or
17 for set-off of any payments made or to be made to Plaintiffs, arising from or on account of any
18 contract, agreement, or arrangement between Defendants and any person for performance of
19 activities pursuant to this Decree, including, but not limited to, claims on account of construction
20 delays. In addition, Defendants shall indemnify and hold harmless Plaintiffs with respect to any
21 and all claims for damages or reimbursement arising from or on account of any contract,
22 agreement, or arrangement between any Defendant and any person for performance of activities
23 pursuant to this Decree, including, but not limited to, claims on account of construction delays.
24

25 54. No later than fifteen (15) days before commencing any work on the Project Site,
26 Defendants shall cause to be maintained comprehensive general liability insurance and
27

1 automobile liability insurance with limits of \$10,000,000 (ten million dollars), combined single
2 limit. The Trustees shall be named additional insureds on any such policies with respect to all
3 liability arising out of the activities performed by or on behalf of Defendants pursuant to this
4 Decree. In addition, for the duration of this Decree Defendants shall satisfy, or shall ensure that
5 their contractors or subcontractors satisfy, all applicable laws and regulations regarding the
6 provision of worker's compensation insurance for all persons performing any work involved in
7 implementing this Decree. No later than fifteen (15) days before commencing any work
8 involved in implementing this Decree, Defendants shall provide to the Trustees certificates of
9 such insurance and copies of such insurance policies. Defendants shall resubmit such certificates
10 and copies of policies each year on the anniversary of the Effective Date of this Consent Decree.
11
12 If Defendants demonstrate by evidence satisfactory to the Trustees that any contractor or
13 subcontractor maintains insurance equivalent to that described above, or insurance covering the
14 same risks but in a lesser amount, then, with respect to that contractor or subcontractor,
15 Defendants need provide only that portion of the insurance described above that is not
16 maintained by the contractor or subcontractor.
17
18

19 **XVII. COVENANT NOT TO SUE BY PLAINTIFFS**

20 55. Except as specifically provided in Section XX (Reservations of Rights) below,
21 Plaintiffs covenant not to sue or to take administrative action against Defendants pursuant to
22 Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311 of the
23 Clean Water Act (CWA), 33 U.S.C. § 1321; Section 1002(a) of the Oil Pollution Act of 1990
24 (OPA), 33 U.S.C. § 2702(a); or any applicable tribal law, to recover Covered Natural Resource
25 Damages. This covenant not to sue will take effect upon Defendants' payment of costs pursuant
26 to Section XI (Reimbursement of Past Assessment Costs), and is conditioned upon the
27

1 satisfactory performance by Defendants of their obligations under this Consent Decree. This
2 covenant not to sue extends only to Defendants and does not extend to any other person except to
3 successors and assigns of Exxon Mobil and Vigor, but only to the extent that liability is based
4 solely on such person's status as the successor or assign of Exxon Mobil or Vigor.

5 **XVIII. RESERVATIONS OF RIGHTS**

6
7 56. Plaintiffs reserve, and this Decree is without prejudice to, all rights against
8 Defendants with respect to all matters not expressly included within the Covenant Not to Sue by
9 Plaintiffs in Section XVII. Notwithstanding any other provision of this Consent Decree,
10 Plaintiffs reserve all rights against Defendants with respect to:

11 a. liability for any other costs, including without limitation, costs of response
12 incurred or to be incurred by the United States, the State, or the Tribes under any federal or State
13 statute or tribal law that are not within the definition of Covered Natural Resource Damages;

14 b. liability for damages to Natural Resources (including assessment costs) as
15 defined in 42 U.S.C. §§ 9601(6 & 16) that are not within the definition of Covered Natural
16 Resource Damages;

17 c. liability for damages to Natural Resources (including assessment costs) as
18 defined in 42 U.S.C. §§ 9601(6 & 16) within the Lower Duwamish River and/or Elliott Bay
19 resulting from new releases of hazardous substances or discharges of oil from Defendant's
20 property and/or operations after the Effective Date of this Decree;

21 d. liability for damages to Natural Resources (including assessment costs) as
22 defined in 42 U.S.C. §§ 9601(6 & 16) based upon Defendant's transportation, treatment, storage,
23 or disposal, or the arrangement for the transportation, treatment, storage, or disposal of hazardous
24

1 substances at or in connection with the Lower Duwamish River, after the Effective Date of this
2 Decree;

3 e. liability for injunctive relief or administrative order enforcement under any
4 federal or State statute;

5 f. liability under Section 107(a)(4)(D), 42 U.S.C. § 9607(a)(4)(D), for costs
6 of any health assessment or health effects study carried out under 42 U.S.C. § 9604(i);
7

8 g. additional claims for Covered Natural Resource Damages if conditions,
9 factors or information in the Lower Duwamish River and/or Elliott Bay, not known to the
10 Trustees as of the Effective Date, are discovered that, together with any other relevant
11 information, indicate that there is a threat to the environment, or injury to, destruction of, or loss
12 of Natural Resources of a type unknown, or of a magnitude significantly greater than was
13 known, as of the Effective Date of this Decree (for purposes of this Subparagraph, information
14 known to the Trustees shall consist of any information in the files of, or otherwise in the
15 possession of, any one of the individual Trustees, or their contractors or consultants who worked
16 on the Trustees' natural resource damages assessment and liability allocation projects);
17

18 h. criminal liability to the United States or State; and
19

20 i. liability for failure of Defendants to satisfy the requirements of this Decree.
21

22 **XIX. COVENANT NOT TO SUE AND RESERVATION OF RIGHTS BY**
23 **DEFENDANTS**

24 57. Defendants covenant not to sue and agree not to assert any claims or causes of
25 action against the United States, the State, the Suquamish Tribe, and the Muckleshoot Indian Tribe,
26 or their contractors or employees, relating to Covered Natural Resource Damages, including, but
27 not limited to:

1 a. any direct or indirect claim for reimbursement of any payment for Covered Natural
2 Resource Damages from the Hazardous Substance Superfund based on CERCLA Sections 107,
3 111, 112, 113, or any other provision of law;

4 b. any claim against the United States, the State, or the Tribes pursuant to Sections
5 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Covered Natural Resource
6 Damages; or

7 c. any claims arising out of activities related to the Restoration Projects,
8 including, without limitation, claims based on the Trustees' approval of the Projects, oversight and
9 monitoring of the Restoration Projects, and/or approval of plans for such activities.
10

11 58. Vigor and Exxon Mobil each reserve, and this Decree is without prejudice to, all
12 rights, including defenses and counterclaims, with respect to all matters reserved in Section XVIII
13 (Reservation of Rights).
14

15 **XX. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

16 59. Nothing in this Decree shall be construed to create any rights in, or grant any
17 cause of action to, any person not a Party to this Decree. Each of the Parties expressly reserves
18 any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C.
19 § 9613), defenses, claims, demands, and causes of action each Party may have with respect to
20 any matter, transaction, or occurrence relating in any way to the Lower Duwamish River against
21 any person not a Party hereto. Nothing in this Decree diminishes the right of the United States,
22 pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any
23 such persons to obtain additional relief (including response action, response costs, and natural
24 resource damages) and to enter into settlements that give rise to contribution protection pursuant
25 to Section 113(f)(2).
26
27

1 60. The Parties agree, and by entering this Decree this Court finds, that this
2 settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2), and that
3 Defendants are entitled, as of the Effective Date of this Decree, to protection from contribution
4 actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW
5 70.105D.040(4)(d), or as may be otherwise provided by law, for Covered Natural Resource
6 Damages; provided, however, that if Plaintiffs exercise their rights under the reservations in
7 Section XVII, other than in Paragraphs 56(h) (criminal liability) and 56(i) (failure to satisfy a
8 requirement of this Decree), the contribution protection afforded by this Decree will no longer
9 include those matters that are within the scope of the exercised reservation.
10

11 61. Defendants agree that they will each notify the Trustees and the United States in
12 writing no later than sixty (60) days before bringing a suit or claim for contribution for Covered
13 Natural Resource Damages. Defendants also will each notify the Trustees of any settlement of
14 its claims (regardless of whether the claim is filed or unfiled) for contribution for Covered
15 Natural Resource Damages. Defendants also agree that they will each notify the Trustees and
16 the United States in writing within ten (10) days of service of a complaint or claim upon a
17 Defendant relating to a suit or claim for contribution for Covered Natural Resource Damages. In
18 addition, Defendants will each notify the Trustees and the United States within ten (10) days of
19 service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of
20 any order from a court setting a case for trial for matters related to this Decree.
21
22

23 62. In any subsequent administrative or judicial proceeding initiated by Plaintiffs for
24 injunctive relief, recovery of response costs, or other appropriate relief other than Covered
25 Natural Resource Damages, Defendants shall not assert, nor may they maintain, any defense or
26 claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion,
27

1 claim-splitting, or other defenses based upon any contention that the claims raised by Plaintiffs
2 in the subsequent proceeding were or should have been brought in the instant case; provided,
3 however, that nothing in this Paragraph affects the enforceability of the Covenants Not to Sue set
4 forth in Sections XVII and XIX.

5 **XXI. RETENTION OF RECORDS**

6
7 63. Until ten (10) years after Defendants' receipt of the Trustees' notification
8 pursuant to Paragraph 12 (Notice of Approval of Completion of Initial Maintenance and
9 Monitoring Obligations), Defendants shall preserve and retain all non-identical copies of records
10 and documents (including records or documents in electronic form) now in their possession or
11 control or which come into their possession or control that relate in any manner to their liability
12 or the liability of any other person under CERCLA with respect to the Lower Duwamish River.
13 Defendants must also retain, and instruct their respective contractors and agents to preserve, for
14 the same period of time specified above all non-identical copies of the last draft or final version
15 of any documents or records (including documents or records in electronic form) now in their
16 possession or control or which come into their possession or control that relate in any manner to
17 the performance of the Projects, provided, however, that Defendants (and their contractors and
18 agents) must respectively retain, in addition, copies of all data generated during the performance
19 of the Work and not contained in the aforementioned documents required to be retained. Each of
20 the above record retention requirements shall apply respectively and individually to Defendants,
21 regardless of any corporate retention policy to the contrary.
22
23
24

25 64. At the conclusion of this document retention period, Defendants shall each
26 respectively notify the Trustees at least ninety (90) days prior to the destruction of any such
27 records or documents, and except as provided in Paragraph 65 (Privileged and Protected Claims),
28

1 upon written request by the Trustees, Defendants shall deliver any such non-privileged records or
2 documents to the Trustees.

3 65. Privileged and Protected Claims. Defendants may assert that certain documents,
4 records and other information are privileged under the attorney-client privilege or any other
5 privilege recognized by federal law. If a Defendant asserts such a privilege, it shall provide
6 Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of
7 the document, record, or information; (3) the name and title of the author of the document,
8 record, or information; (4) the name and title of each addressee and recipient; (5) a description of
9 the subject of the document, record, or information; and (6) the privilege asserted by Defendant
10 or Defendants. However, no documents, reports or other information created or generated
11 pursuant to the requirements of the Decree, or any data regarding the LDR and/or Elliott Bay,
12 including, but not limited to, all sampling, analytical, monitoring, scientific, chemical, or
13 engineering data, or the portion of any other record that relates to the Restoration Projects or
14 conditions within or around the LDR, shall be withheld on the grounds that they are privileged.

15
16
17 66. Defendants each hereby certify individually that, to the best of its knowledge and
18 belief, after a reasonable inquiry that fully complies with the Federal Rules of Civil Procedure, it
19 has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents
20 or other information (other than identical copies) relating to its potential liability regarding the
21 Site since notification of potential liability by any Trustee.
22

23 **XXII. NOTICES AND SUBMISSIONS**

24
25 67. Whenever notice is required to be given or a document is required to be sent by
26 one Party to another under the terms of this Decree, it will be directed to the individuals at the
27 addresses specified below, unless those individuals or their successors give notice of a change to

1 the other Parties in writing. Written notice by regular mail as specified constitutes complete
2 satisfaction of any written notice requirement of the Decree for Plaintiffs and Defendants.

3 As to the United States and as to DOJ:

4 EES Case Management Unit
5 Environment and Natural Resources Division
6 U.S. Department of Justice
7 P.O. Box 7611
8 Washington, D.C. 20044-7611
(DJ #90-11-3-07227/4)

9 Erika Wells
10 U.S. Department of Justice
11 c/o NOAA/Damage Assessment
7600 Sand Point Way, NE
Seattle, WA 98115

12 As to NOAA:

13 Laurie Lee
14 NOAA Office of General Counsel
15 501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802

16 Marla Steinhoff
17 Regional Resource Coordinator
18 Office of Response and Restoration
Assessment and Restoration Division
19 7600 Sand Point Way NE, Bldg. 1,
20 Seattle, WA 98115-6349

21 As to the United States Department of the Interior:

22 Deirdre Donahue
23 U.S. Department of the Interior
24 Office of the Solicitor
601 SW 2nd Avenue, Suite 1950
Portland, OR 97204

25 Jeff Krausmann
26 U.S. Fish & Wildlife Service
27 510 Desmond Dr. SE, Suite 102
Lacey, WA 98503-1263

1 As to the State:

2 Donna Podger
3 Toxics Cleanup Program
4 State of Washington
5 P.O. Box 47600
6 Olympia, WA 98504-7600

7 As to the Suquamish Tribe:

8 Melody Allen
9 Suquamish Tribe
10 Office of Tribal Attorney
11 P.O. Box 498
12 Suquamish, WA 98392-0498

13 As to the Muckleshoot Indian Tribe:

14 Rob Otsea and Trent Crable
15 Office of the Tribal Attorney
16 Muckleshoot Indian Tribe
17 39015 172nd Avenue S.E.
18 Auburn, WA 98002

19 As to Defendant Vigor:

20 Alan Sprott
21 Vice President
22 Vigor Industrial LLC
23 5555 N. Channel Avenue
24 Portland, OR 97217

25 Charles R. Blumenfeld
26 Perkins Coie LLC
27 1201 Third Avenue, Suite 4900
28 Seattle, WA 98101

As to Defendant Exxon Mobil:

U.S. Claims & Superfund Manager
Exxon Mobil Environmental Services Company
22777 Springwoods Village Pkwy (S2 2B 282)
Spring, TX 77389

Kevin Vaughn
Counsel, Environmental & Safety
22777 Springwoods Village Pkwy (E2 3B 508)
Spring, TX 77389

XXIII. EFFECTIVE DATE

68. The effective date of this Consent Decree shall be the date upon which the approval of this Decree is recorded on the Court's docket.

XXIV. RETENTION OF JURISDICTION

69. This Court retains jurisdiction over both the subject matter of this Decree and the Parties for the duration of the performance of the terms and provisions of this Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIV (Dispute Resolution) hereof.

XXV. INTEGRATION/APPENDICES

70. This Decree and its appendices constitute the final, complete, and exclusive agreement and understanding with respect to the settlement embodied in this Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree. The terms "Consent Decree" and "Decree" as used herein include the appendices to this Decree, unless expressly indicated to the contrary. The following appendices are attached to and incorporated into this Decree:

Appendix A Vigor Shipyards Habitat Projects Scope of Work

1 Appendix B Legal Description(s) and Map of the property included within the definition of
2 Covered Natural Resource Damages

3 Appendix C Environmental Covenant (Defendant Vigor's property)

4 Appendix D Performance Guarantee for Monitoring, Maintenance and Long-term Stewardship
5 of the Projects

6 **XXVI. MODIFICATION**

7 71. No material modifications shall be made to any requirement under this Decree
8 without written notification to and written approval of the United States Department of Justice
9 and the Trustees, Defendants, and the Court. Modifications to this Consent Decree exclusive of
10 the appendices incorporated within that do not materially alter the terms of this Decree may be
11 made by written agreement between the United States Department of Justice, the Trustees, and
12 Defendants. Modifications to any of the appendices to this Decree that do not materially alter any
13 of the terms of this Decree may be made by written agreement between the Trustees and
14 Defendants.
15

16 **XXVII. ENFORCEMENT**

17 72. The requirements of this Decree, including but not limited to deadlines, schedules
18 and Project designs, are independently enforceable. Any delay or failure of the Trustees to
19 enforce any requirement will not preclude or prejudice the subsequent enforcement of the same
20 or another requirement.
21

22 **XXVIII. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION**

23 73. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the
24 Internal Revenue Code, 26 U.S.C. §162(f)(2)(A)(ii), performance of Paragraph 3; Paragraph 5;
25 Section VII (Restoration Projects), Paragraphs 9-16, 18, and 20-24 and related Appendix A;
26 Section VIII (Access To Information And Project Sites), Paragraphs 27-29; Section
27

28 CONSENT DECREE – Page 55

U. S. DEPARTMENT OF JUSTICE
Environment and Natural Resources Division
7600 Sand Point Way NE
Seattle, WA 98115

1 IX (Selection Of Contractors), Paragraph 30; Section X (Reimbursement Of Restoration
2 Implementation Costs), Paragraph 31; Section XI (Past Assessment Cost Reimbursement),
3 Paragraphs 32-34; Section XVI (Indemnification; Insurance), Paragraphs 52-54; and Section
4 XXI (Retention Of Records), Paragraphs 63, 64, and 66, is restitution or required to come into
5 compliance with law.

6
7 **XXIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

8 74. This Decree will be lodged with the Court for a period of not less than thirty (30)
9 days for public notice and comment. Plaintiffs each reserve the right to withdraw or withhold
10 their consent if the comments regarding the Decree disclose facts or considerations that indicate
11 this Decree is inappropriate, improper, or inadequate. Defendants consent to the entry of this
12 Decree without further notice.

13
14 75. If for any reason this Court does not approve this Decree in the form presented,
15 this Decree may be voided at the sole discretion of any Party, and the terms of the agreement
16 may not be used as evidence in any litigation among the Parties.

17
18 **XXX. SIGNATORIES/SERVICE**

19 76. The Assistant Attorney General for the Environment and Natural Resources
20 Division of the United States Department of Justice and each undersigned representative of the
21 State, the Suquamish Tribe, the Muckleshoot Indian Tribe, and Defendants certifies that he or
22 she is authorized to enter into the terms and conditions of this Decree and to execute and bind
23 legally the Party that he or she represents to this document.

24
25 77. Defendants agree not to oppose entry of this Decree by this Court or to challenge
26 any provision of this Decree unless any Plaintiff has notified Defendants in writing that it no
27 longer supports entry of the Decree.

78. Defendants will identify on the attached signature page the name and address of an agent who is authorized to accept service of process by mail on behalf of each of them with respect to all matters relating to this Decree. Defendants agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons. Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Decree.

XXXI. FINAL JUDGMENT

79. Upon approval and entry of this Decree by the Court, this Decree shall constitute a final judgment between and among the United States, the State, the Suquamish Tribe, the Muckleshoot Indian Tribe, and Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS DAY OF , 2021.

United States District Judge

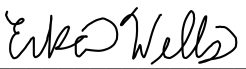
1 Signature Page for Decree regarding the Lower Duwamish River

2 *U.S., et al., v. Vigor Industrial, LLC & Exxon Mobil Corp.*

3
4 FOR THE UNITED STATES OF AMERICA:

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6
7 JONATHAN D. BRIGHTBILL
8 Principal Deputy Assistant Attorney
9 General
10 Environment & Natural Resources
11 Division U.S. Department of Justice
12 Washington, D.C. 20530

13 Date: 1/7/2021

14 
15 ERIKA M. WELLS
16 Senior Counsel
17 Environmental Enforcement Section
18 Environment & Natural Resources
19 Division U.S. Department of Justice
20 c/o NOAA Damage Assessment
21 7600 Sand Point Way, NE Seattle,
22 Washington 98115
23
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27

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2 *U.S., et al., v. Vigor Industrial, LLC & Exxon Mobil Corp.*

3
4 FOR DEFENDANT VIGOR INDUSTRIAL LLC:

5
6 Date:

10/17/2020



7 T. ALAN SPOTT


8 Vice President, Environmental Services
9 Vigor Industrial LLC

1 Signature Page for Decree regarding the Lower Duwamish River

2 *U.S., et al., v. Vigor Industrial, LLC & Exxon Mobil Corp.*

3 FOR DEFENDANT EXXON MOBIL CORP.:
4

5
6
7 Date: 10/20/2020


8 Maria M. Quezada
9 Agent and Attorney in Fact
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1 Signature Page for Decree regarding the Lower Duwamish River

2 *U.S., et al., v. Vigor Industrial, LLC & Exxon Mobil Corp.*

3
4 FOR THE STATE OF WASHINGTON:

5
6 Date: 11/23/2020



REBECCA LAWSON
Toxic Cleanup Program Manager
Department of Ecology

9
10
11 Date: 11/24/2020




JONATHAN THOMPSON
Assistant Attorney General
State of Washington

Signature Page for Decree regarding the Lower Duwamish River

U.S., et al., v. Vigor Industrial, LLC & Exxon Mobil Corp.

FOR THE SUQUAMISH TRIBE:

Date: 08/27/2020

DocuSigned by:

F19A5D9A5D7A4A4...


LEONARD FORSMAN
Chairman
Suquamish Tribe
Post Office Box 498
Suquamish, Washington 98392

1 Signature Page for Decree regarding the Lower Duwamish River

2 *U.S., et al., v. Vigor Industrial, LLC & Exxon Mobil Corp.*

3
4 FOR THE MUCKLESHOOT INDIAN TRIBE:

5
6 Date: 1-11-21



JAISON ELKINS
Chairperson
Muckleshoot Indian Tribe
39015 172nd Ave. S.E.
Auburn, WA 98092-9763